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No. 1173

In the
Supreme Court of the United States
OCTOBER TERM, A.D., 1970

PEACOCK RECORDS, INC., a Texas Corporation, and DON D. ROBEY,

Petitioners,

vs.

CHECKER RECORDS, INC., an Illinois Corporation, CHESS RECORD CORPORATION, an Illinois Corporation, and PHIL CHESS and LEONARD CHESS,

Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For the Seventh Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION

ANTHONY BRADLEY EBEN
One North LaSalle Street
Chicago, Illinois 60602
CEntral 6-7722
Counsel for Respondents

The Scheffer Press, Inc.—ANdover 3-6250

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STATEMENT

1. Introduction

The dispute in the trial court between the parties here was almost entirely concerned with the contractual claims of each to the exclusive recording services of a gospel singing group known as the Five Blind Boys (hereinafter "the Blind Boys"). The pleadings posing the issues are succinctly and correctly summarized in the opinion below.

Peacock Records, Inc., et al. v. Checker Records Company, et al. (7 Cir. 1970) 430 F.2d 85, 86. Those pleadings make evident that the actual date of petitioners' contract with that group was the single most important fact to be determined at the trial. Petitioners claimed their contract was executed on October 5, 1960 and hence was in existence prior to respondents' admitted December 22, 1960 contract with the group. Respondents claimed that petitioners' contract was not actually executed until May of 1961 and was pre-dated to October 5, 1960 in furtherance of a conspiracy directed against them by petitioners and the Blind Boys.

2. Course of the Proceedings

This cause when first tried by the trial court without a jury resulted in a judgment against respondents. During the course of that trial, four of the Blind Boys testified in support of petitioners' claims as to the date of the execution of their contract. Respondents appealed the judgment to the court below.

While the appeal there pended, respondents, pursuant to Rule 60(b), F.R.C.P., filed in the trial court their motion to vacate the judgment on the grounds that it had been fraudulently obtained by means of perjured testimony suborned by petitioners. This motion was supported by the sworn statements of three of the Blind Boy witnesses (Woodard, Clinkscales, and Abram) who had testified for petitioners at the first trial.[1] In their statements, these

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[1] These three witnesses and Mrs. Abram, the wife of one of them, testified at the retrial to their perjuries. In addition, two other of petitioners' witnesses (who did not appear at the first trial) returned to the stand in the second trial and confessed that their testimony previously given therein was false and perjured at petitioners' behest. Thus, there were six judicial confessions of perjury in the second trial of this case.

witnesses swore that their testimony as so given was entirely false, perjured, and suborned by petitioners who, as consideration therefor, had promised the Blind Boys fifty per cent of any judgment obtained against respondents. The statements set forth the facts and circumstances of the conspiracy and steps taken in furtherance of its objective to provide a basis for petitioners' suit against respondents. These steps included the pre-dating of petitioners' contract with the Blind Boys to October 5, 1960, although it had not actually been executed until the spring of 1961.

Despite the failure of petitioners to file any counter-affidavits or to challenge the Blind Boys' sworn statements, the trial court denied respondents' Rule 60(b) motion and refused to take the oral testimony of the Blind Boys in support of their sworn statements although such evidence was proffered. Respondents also appealed the denial of this motion to the court below which after hearing both appeals reversed and remanded the cause for new trial. *Peacock Records, Inc.* v. *Checker Records, Inc.*, (7 Cir. 1966) 365 F.2d 145. When it decided that case, the court below had before it the record of the first trial as well as the proceedings under the Rule 60(b) motion and documents filed in support thereof. (See *Peacock*, (1966), 365 F. 2d 145 at 148.) Petitioners sought review of this decision in this Court and their petition for certiorari was denied. *Peacock Records, Inc.* v. *Checker Records, Inc.* (1967), 385 U.S. 1032.

After remandment and prior to the new trial, respondents filed their motion in the trial court to recuse the trial judge pursuant to 28 U.S.C.A. §144. This motion was supported by the affidavit of one of respondents together with the entire record of the proceedings, sworn statements, and proceedings before the trial court on respondents' Rule

60(b) motion, including the trial court's comments and colloquies with counsel.

In essence, respondents' affidavit alleged the trial judge's bias and prejudice on the following grounds:

1. At the first bench trial, petitioners offered the testimony of three members of the Blind Boys (Woodard, Clinkscales, and Abram) to establish the material fact that the contracts relied on by petitioners in three counts of their complaint were actually executed on October 5, 1960 and that respondents were so advised when they subsequently contracted with the Blind Boys on December 22, 1960.

2. These three witnesses thereafter recanted this testimony and confessed under oath that it was entirely false, perjured, and suborned by petitioner Robey who had promised the Blind Boys fifty per cent of any judgment obtained against respondents. The confessions were in the form of sworn statements and set forth the details of the conspiracy between petitioners and members of the Blind Boys to pre-date petitioners' contracts with that group.

3. When these sworn statements came before the trial judge in the proceedings on petitioners' Rule 60(b) motion, he declined to hear from these three witnesses who in open court had indicated to him their willingness and desire to testify to their perjuries at the first trial and to the true facts as set forth in their statements.

4. The refusal of the trial judge to hear these witnesses was based upon his expressed belief that their confessions of perjury were false and had been procured by the payment of money to them by respondents.

5. Respondents at the new trial would call these three witnesses to testify for respondents as to their perjuries in the first trial in accordance with their statements in sup-

port of respondents' Rule 60(b) motion and their testimony would go directly to the heart of the issues posed by the pleadings.

6. Because of the trial judge's preconceived and fixed belief in advance of the new trial as to the falsity of the witnesses' confessions, he could and would not consider their testimony to be given on respondents' behalf at such trial.

7. The trial judge on the new trial would, however, consider all of the evidence taken at the first trial. Thus, respondents on the new trial would be confronted with the perjured testimony of these three witnesses which would be given weight despite their recantations, whereas their testimony as to the true facts would be given no weight at all.

During the colloquy on respondents' motion to recuse, their counsel suggested that if the trial court would impanel a jury to hear the issues at the new trial, it would not be necessary to press the matter further since such a jury would determine questions of fact and matters of credibility. In response to this, the trial judge stated that he would deny a jury trial even if the parties agreed thereto because such a trial would "compel new testimony all the way from start to finish."

The trial judge then refused to grant respondents' motion to recuse solely on the grounds of his belief that transfer of the case would impose a burden on a fellow judge who would have to try it anew.[1] He never did rule on the

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[1] The reasons relied on by the trial court in refusing a jury trial and in denying respondents' motion to recuse clearly established its intent not to hear the case *de novo* and thus substantiates the portion of the decision below relating thereto. *Peacock*, (1970) 430 F.2d 65, 68, 69.

only ground which would support his denial of the motion, i.e., insufficiency of respondents' affidavit to support their 28 U.S.C.A. §144 motion.

The new trial resulted in a judgment for petitioners and respondents again appealed to the court below, arguing as error, among other things, the trial judge's denial of their motion to disqualify him. The record before the court below included not only the new trial on the merits, but also respondents' 28 U.S.C.A. §144 motion supported as above set forth (pp. 3, 4) together with the record of the hearing on that motion. The record of the first trial had already been before the court below on the first appeal. (*Peacock*, (1966), 365 F.2d 145)

ARGUMENT

PETITIONERS FAIL TO MAKE ANY SHOWING OF SPECIAL AND IMPORTANT REASONS WARRANTING THE GRANTING OF A WRIT OF CERTIORARI.

This case and the decision below are quite simple. Petitioners advance no "special and important reasons" for granting their petition as required by Rule 19 of this Court. Nevertheless, they would unnecessarily increase what Mr. Justice Black has recently referred to as the "heaviest caseload" in the history of this Court. 39 U.S. Law Weekly, p. 3331. The decision sought to be reviewed is quite uncomplicated and involves only the legal sufficiency of respondents' recusatory motion directed against the trial court pursuant to 28 U.S.C.A. §144. It is basic that in determining this motion the trial court was required to take the facts stated in respondents' affidavit supporting the motion as true. *Wolfson* v. *Palmieri* (2nd Cir., 1968), 396 F.2d 121, 124. The only question on this phase of the appeal to be determined below was whether those facts as so alleged gave fair support to respondents' charge that the trial court was on a "bent of mind that may [would] prevent or impede impartiality of judgment." *Berger* v. *United States* (1921) 255 U.S. 22, 31.

The court below gave recognition to these standard principles and, after correctly summarizing the facts relied on by respondents to establish bias, determined the question adversely to petitioners.[1] It is difficult to see how it could

[1] Petitioners do not challenge the lower court's summary of these facts (See Petition, p. 4). They could not since it is taken directly from respondents' affidavit and documents in support thereof which were part of the record below. Petitioners have not seen fit to bring that record here.

have done otherwise since respondents established for the purposes of their motion that the trial court in advance of the retrial had indicated it would not believe three of their principal witnesses. Even worse, the affidavit established that prior to the retrial, the trial judge had charged respondents with suborning perjury with respect to the very testimony their witnesses would give on their behalf at the new trial. *Peacock*, (1970), 430 F.2d at 87, 88.[4]

Despite the application by the court below of the rather elementary principles here involved to these undeniable facts,[5] petitioners seek review of its decision on the alleged grounds that the court below has so far departed from the accepted and usual course of judicial proceedings that it has twice denied petitioners a trial by a trial judge. (Petition, pp. 2, 3, 15).[6] The departure is claimed to have occurred because the court below:

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[4] Other facts establishing the trial court's bias and prejudice were also set forth in respondents' affidavit, such as those relating to the intention of the trial judge not to hear the case *de novo* as required by the mandate of the court below in the 1966 case.

[5] The charge of the trial judge's bias was based largely on his own comments and order denying respondents' Rule 60(b) motion, all of which appear in the record below. A portion of this matter is set out in *Peacock*, (1966), 365 F.2d at 147 and in *Peacock*, (1970), 430 F.2d at 88.

[6] Although not so stated under their Questions Presented, petitioners at a later point in their petition state their position in terms of denial of due process. (Petition, p. 14). They also at the same place and thereafter seek to inject an equal protection of the law issue into this case by stating that petitioners are "black", "Negro", and respondents are "white" (Petition, pp. 14, 30). No argument is made in support of this contention nor are any relevant facts or law set forth bearing thereon. This unworthy and somewhat paranoid attempt of petitioners to attack the court below provides a fair measure of petitioners' logic and the merits of their petition.

(a) Reversed the trial court on the first appeal, and substituted its judgment as to the credibility of witnesses thus improperly limiting the trial court's discretion in deciding a Rule 60(b) F.R.C.P. motion (Petition, p. 2).

(b) Reversed the trial court on the second appeal by going beyond the record before it and holding legally sufficient an affidavit in support of a motion to recuse under 28 U.S.C.A. §144. This is also said to have resulted in the substitution of its opinion for the trial court's on matters of credibility (Petition, p. 3).

It is quite apparent that in nothing to state their case here in terms of denial of trial, petitioners tacitly recognize that the grounds for both reversals below do not of themselves give rise to "special and important reasons" for granting certiorari. However, the lack of merit as well as logic in petitioners' contentions as to denial of trial are at once evident. Here they have had two trials and are to have their day in court on a third. It is elementary that reversal (even if incorrect) after a trial on the merits on germane grounds other than trial errors does not amount to a denial of trial, particularly where, as here, the cause is remanded for a new trial (See Mr. Justice Frankfurter's dissenting opinion, *Dick* v. *New York Life Insurance Company* (1959) 359 U.S. 437 at 455). If the opposite of this proposition were true, this Court would be inundated with petitions for certiorari based on the same alleged constitutional question sought to be raised here by petitioners in a non-final judgment case.

Petitioners' argument patently overlooks the fact that their case is now at an interlocutory stage since a new trial

has been ordered. Under such circumstances, this court has indicated it will not issue a writ of certiorari "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Company* v. *Jacksonville, Tampa and Key West Railway Company*, (1893) 148 U.S. 372, 384.

Petitioners make no such showing and do not demonstrate that the decision below "involves principles, the application of which are of wide public or governmental interest, and which should be authoritatively declared by the final court." Taft, The Jurisdiction of the Supreme Court Under the Act of February 13, 1925, 35 Yale L.J. 1, 2 (1925). See *Rice* v. *Sioux City Cemetery, Inc.*, 349 U.S. 70, 74.

Petitioners argue only in terms of wrong to themselves as private litigants and then only by torturing the credibility provision of Rule 52(a) F.R.C.P. which they would apply to motions under Rule 60(b) F.R.C.P. and 28 U.S. C.A. §144. Rule 52(a) F.R.C.P., of course, permits reversal of a trial court's findings when a reviewing court is "left with the definite and firm conviction that a mistake has been committed", *United States* v. *United States Gypsum Co.*, (1948) 333 U.S. 364, 395. Both reversals below are rife with evidence of that conviction. In passing, respondents observe that matters of credibility are not beyond a reviewing court. *Jackson* v. *United States*, (C.A.D.C., 1965) 353 F.2d 863, 865-66.

By far the largest part of petitioners' argument is directed to matters concerning which this Court denied certiorari over four years ago. *Peacock*, (1967) 385 U.S. 1003.[1] Respondents therefore do not reply to that argument.

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[1] Eleven of the fifteen pages of Reasons for Granting the Writ attack the 1966 decision of the court below (Petition,

Stripped of the grounds already determined insufficient by at least six members of this Court, petitioners are reduced to the sole contention that the alleged erroneous method of review below (review of the first trial record) of the denial of respondents' 28 U.S.C.A. §144 motion in some way is so important as to warrant review here. Petitioners make no showing as to this at all nor could they for the following reasons:

1. The record of the first trial was before the court below on the first appeal and hence that court could, under the circumstances here, take judicial notice of it. *United States* v. *Pink* (1942) 315 U.S. 203, 216; *Funk* v. *Commissioner of Internal Revenue* (3 Cir., 1947) 163 F.2d 796, 801.

2. Petitioners themselves invited examination of that record by the court below.[5]

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[5] (Continued)

pp. 15-26). The arguments now advanced are the same as those urged when petitioners sought and were denied certiorari in 1967.

[5] In their opening brief in the court below, respondents contended that their charge of bias was established on the basis of the trial judge's own comments when he denied their Rule 60(b) motion. Petitioners countered by arguing that these comments were expressions of opinion based on the evidence and testimony at the first trial and therefore there was no showing of bias arising from extra-judicial sources. Petitioners could not have made that argument without understanding that its merit necessarily would have to be determined on the basis of an examination of the first trial record by the court below.

CONCLUSION

Respondents respectfully submit that petitioners have in no way demonstrated why this Court should be burdened with review of the court below in this matter. The petition should be denied.

Respectfully submitted,

ANTHONY BRADLEY EBER
One North LaSalle Street
Chicago, Illinois 60602
Attorney for Respondents